United Nations S/2004/589

Security Council

Distr.: General
22 July 2004

Original: English

Letter dated 19 July 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

I write with reference to my predecessor's letter of 5 May 2004 (S/2004/371). The Counter-Terrorism Committee has received the attached fourth report from Peru, submitted pursuant to paragraph 6 of resolution 1373 (2001) (see annex). I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Security Council.

(*Signed*) Alexander V. **Konuzin**
Chairman
Security Council Committee established pursuant to
resolution 1373 (2001) concerning counter-terrorism

04-44046 (E) 040804 100804

Annex

Note verbale dated 6 July 2004 from the Permanent Mission of Peru to the United Nations addressed to the Chairman of the Counter-Terrorism Committee

[Original: Spanish]

The Permanent Mission of Peru to the United Nations presents its compliments to the Security Council Committee established pursuant to resolution 1373 (2001) and, in reply to its communication of 26 March 2004, has the honour to transmit herewith the additional information requested.

Enclosure

Letter supplementing the report of the Government of Peru on compliance with Security Council resolution 1373 (2001)*

With respect to the additional information requested by the Counter-Terrorism Committee of the United Nations Security Council (in document S/AC.40/2002/MS/OC.222 of 4 April 2003) regarding the original and supplementary reports submitted by Peru pursuant to Security Council resolution 1373 (2001) which Peru has submitted, the Government of Peru provides the following clarifications:

1. The CTC has agreed on further questions and comments for the consideration of the Government of Peru with regard to the implementation of the resolution, as set out in this section.

1.2 The CTC understands that the Peruvian Supreme Court declared four anti-terrorism laws enacted in the early 1990s as unconstitutional. Which laws have been declared unconstitutional and why? How will this affect the implementation of the resolution? What plans are there for introducing new laws or revisions to the existing legislation? When is this likely to happen? How effective is the current legislation as it stands?

It was not the Peruvian Supreme Court but the Constitutional Court, an autonomous, independent body responsible for reviewing the Political Constitution pursuant to article 200, paragraph 4, and article 201 thereof, which made the aforementioned declaration of unconstitutionality.

A copy of this declaration is attached herewith as Annex I.

Which laws have been declared unconstitutional and why?

In its decision of 3 January 2003, the Constitutional Court declared various articles of the following decree laws to be unconstitutional:

- Decree Law No. 25475, promulgated on 6 May 1992, which establishes penalties for the crime of terrorism and procedures for its investigation, pre-trial hearing and trial;[1]
- Decree Law No. 25659, promulgated on 13 August 1992, governing the offence of treason against the nation;
- Decree Law No. 25708, promulgated on 10 September 1992, setting forth rules for proceedings in trials for the offence of treason against the nation;
- Decree Law No. 25880, promulgated on 26 November 1992, governing support for terrorism by teachers; and
- Decree Law No. 25744, promulgated on 27 September 1992, setting forth rules to be applied to police investigation, pre-trial hearing and trial, as well as the enforcement of sentences for crimes of treason against the nation provided for in Decree Law No. 25659.

* Annexes are on file with the Secretariat and are available for consultation.

[1] It should be borne in mind that under article 109 of the Political Constitution, an act "... is compulsory as from the day following its publication in the Official Gazette ...".

The Constitutional Court determined that some of the provisions contained in these norms contravened the Political Constitution of Peru in the following main areas:

- The principle of legality, established in article 2, paragraph 24 (d) of the Political Constitution, because of the lack of precision in the categorization of the crime of terrorism and the use of general and broad definitions of it;
- The right to due process and the right to a fair trial, in particular:
  - The right to be tried in an ordinary court, established in article 139, paragraph 3 of the Political Constitution since, in terrorism cases, trying civilians in military courts had been permitted and the defendants had no right whatever to challenge the judges and court officials who participated in the trial; and
  - The right to be brought before a judge without delay, established in article 2, paragraph 24 (f) of the Political Constitution. In cases involving the offence of treason against the nation, the police had been authorized to order periods of remand in excess of 15 days. This provision was inconsistent with the Political Constitution, which provides for a maximum of 15 days' remand in custody;
- Freedom of information and expression, as the generic and imprecise definition of the offence of expressing support for terrorism constituted a disproportionate restriction of those freedoms, which are enshrined in article 2, paragraph 4 of the Political Constitution;
- The right to a nationality, established in article 2, paragraph 21 of the Political Constitution, as cases of expressing support for terrorism committed outside the national territory had been punished by the loss of nationality as a penalty additional to imprisonment;
- Purpose of the prison sentence, covered by article 139, paragraph 22, of the Political Constitution, which stipulates that the purpose of a prison sentence is the re-education, rehabilitation and reintegration of the prisoner into society, whereas the crime of terrorism was punishable by life imprisonment, without provision for early release; and
- The right to liberty and integrity of person, covered by article 2, paragraph 1, of the Political Constitution and by article 5, paragraphs 1, 2 and 6 of the Inter-American Convention on Human Rights, as it was concluded that subjecting a prisoner to solitary confinement for a period of a year constituted a disproportionate penalty.

How will this affect the implementation of the resolution?

Declaring the aforementioned laws unconstitutional has had no impact on the implementation of resolution 1373 (2001), as the purpose was to repeal the legal provisions which violated the Political Constitution of Peru in the area of human rights. By rectifying this situation, national legislation to combat terrorism has been brought into line with international standards.

What plans are there for introducing new laws or revisions to the existing legislation? When is this likely to happen?

As a result of the decision of the Constitutional Court of 3 January 2003, Congress delegated to the Executive Branch the authority to enact counter-terrorism legislation for the purpose of replacing the corresponding legislation.[2]

Accordingly, the following legislative decrees were adopted and are attached to this report as Annex II:[3]

- Legislative Decree No. 921 of 18 January 2003, which establishes the legal regime for life imprisonment in domestic law and the maximum sentence for the crimes covered by articles 2; 3, paragraphs (b) and (c); 4; 5; and 9 of Decree-Law No. 25475;
- Legislative Decree No. 922 of 12 February 2003, which invalidates the procedures for trying the offence of treason against the nation and also establishes rules for the applicable criminal procedure;
- Legislative Decree No. 923 of 20 February 2003, which strengthens the organization and operation of State defence in terrorism offences;
- Legislative Decree No. 924 of 20 February 2003, which adds a paragraph to article 316 of the Penal Code on expressing support for terrorism;
- Legislative Decree No. 925 of 20 February 2003, on effective cooperation in combating terrorism;
- Legislative Decree No. 926 of 20 February 2003, on the invalidation of trials for the crime of terrorism conducted before judges and prosecutors whose identities were kept secret and where the right of challenge had been denied. Act No. 28039 extended the period of time established in article 2 of Legislative Decree No. 926, promulgated on 24 July 2003; and
- Legislative Decree No. 927 of 20 February 2003, on criminal enforcement for crimes of terrorism.

Furthermore, Supreme Decree No. 163-2002-EF, adopting the regulations for the Act establishing the Financial Intelligence Unit, was promulgated on 31 October 2002.

Since October 2002, a Special Committee for Review of the Penal Code, created by Congress,[4] has been preparing preliminary draft legislation amending the Penal Code; the Special Committee appears to be in favour of incorporating all the special criminal legislation on terrorism into the Penal Code.

[2] The said authority was delegated by Congress in the following terms: "Pursuant to this decision of the Constitutional Court and to the delegation of responsibility to the Executive Branch, the Congressional Committee on National Defence, Domestic Security and Intelligence shelved Bill No. 3405/2001-CR, entitled 'Consolidated text of counter-terrorism legislation, regulations governing the crime of terrorism and other statutory provisions'" (mentioned in the fourth paragraph on page 3 of the letter supplementing the report of the Government of Peru on compliance with Security Council resolution 1373 (2001) (S/2002/1085, Annex)).

[3] A Legislative Decree is a legal provision with the standing and force of law which is issued by the Executive Branch through the power delegated to it by Congress under article 5 of the Political Constitution.

[4] Created through Act No. 27837 of 4 October 2002.

The time required for consideration and adoption of the relevant norms will depend on the action taken by Congress.

Bills which would establish the offence of "financing of terrorism", bringing Peruvian law into line with the provisions of resolution 1373 (2001), are also before Congress.

How effective is the current legislation as it stands?

The only offence covered by domestic law is collaboration with terrorism, which is defined in Decree Law No. 25475, article 4 (f), as "any kind of economic action, assistance or intervention undertaken voluntarily for the purpose of financing the activities of terrorist elements or groups". However, as stated above, there are bills which would establish the offence of "financing of terrorism".

1.3 Effective implementation of subparagraph 1 (b) of the resolution requires a State to have in place provisions specifically criminalizing the wilful provision or collection of funds by its nationals or in its territory, by any means directly or indirectly, with the intention that the funds should be used, or in the knowledge that they are to be used, to carry out terrorist acts. For an act to constitute an offence as described above, it is not necessary that the funds are actually used to carry out a terrorist offence (see article 2, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism). The acts sought to be criminalized are thus capable of being committed even if:

- **The only related terrorist act takes place or is intended to take place outside the country;**
- **No related terrorist act actually occurs or is attempted;**
- **No transfer of funds from one country to another takes place;**
- **The funds are of a legal origin.**

Does the new legislation being prepared provide for all the above situations? Please provide an outline of the relevant provisions.

As previously stated, various bills which would establish the offence of "financing of terrorism" are before Congress.

The four possible situations mentioned above are not specifically envisaged in article 4 (f) of Decree Law No. 25475, which states: "Anyone who wilfully secures, gathers, collects or supplies any goods or means or in any manner engages in acts such as to further the commission of offences referred to by this Decree Law or who furthers the goals of a terrorist group shall be punished by a term of imprisonment of not less than 20 years[5] (...) any kind of economic action, assistance or intervention undertaken voluntarily for the purpose of financing the activities of terrorist elements or groups".

[5] The penalty for this offence shall not exceed 25 years' imprisonment, as established in article 2 of Legislative Decree No. 921 of 18 January 2003, which states: "the maximum term of imprisonment for the offences covered by articles 2, 3 (b) and (c), 4 and 5 of Decree Law No. 25475 shall be five years greater than the minimum sentence established for such offences".

However, existing legislation is applicable in the first situation ("The only related terrorist act takes place or is intended to take place outside the country") since, if the financing of terrorism is an independent offence (which it is, as seen from the legislation reproduced above) and if that offence is committed, even in part, in the territory of Peru, then it is a prosecutable offence in Peru regardless of whether the offence financed (the terrorist act itself) takes place or is intended to take place outside Peru. In that regard, the Penal Code establishes the principle of territoriality in the following terms: "Peruvian criminal law shall apply to anyone who commits a punishable offence within the territory of the Republic ...".

With respect to the second situation ("No transfer of funds from one country to another takes place"), it should be borne in mind that the offence of collaboration in the form of economic assistance is defined as an independent offence, regardless of whether the act intended to be financed or assisted actually takes place (the Penal Code makes it clear that it is sufficient that the act takes place "for the purpose of financing the activities of terrorist elements or groups"). Thus it is irrelevant whether the subsequent act for which economic assistance is provided actually occurs or is attempted.

With respect to the third situation ("No transfer of funds from one country to another takes place"), it is not necessary for the illegal act of financial collaboration to take the form of furnishing or transferring funds to another party since, in order to meet the definition of the offence, it is sufficient for the perpetrator to be involved in raising or collecting a sum of money; the offence is defined as the subjective commission of this activity for purposes of collaboration, regardless of whether the funds in question are actually transferred.

With respect to the fourth situation ("The funds are of a legal origin"), all forms of financing are covered by the definition of the offence, regardless of whether the funds involved are of a legal origin. The illegality of the deliberate intent that funds or other assets shall be used for the financing of terrorist acts is not affected by the possible legal origin of the funds or assets in question.

1.4 It is stated in reply to subparagraph 1 (c) (page 6 of the supplementary report) that there is no law that permits the freezing of assets during the police investigation stage. Please explain then how Peru would deal with requests from another State to freeze funds held in Peru by a resident or non-resident that it suspects of financing terrorist activity in its territory.

As stated in Peru's supplementary report (S/2002/1085), Act No. 27379 providing for special restrictions on rights during preliminary judicial investigations authorizes, inter alia, the taking of measures to freeze funds and confiscate property and other assets at the request of the representative of the Public Prosecutor's Office or by court order, before criminal proceedings have officially been initiated.

Requests to freeze funds made by other States are received through the Ministry of Foreign Affairs and transmitted to the competent judges, who order the taking of measures to freeze such funds after considering the evidence in support of a genuine link with terrorist acts or internationally recognized terrorist organizations. In order to do so, the judges must assess the legitimacy of the request on the basis of the agreements on reciprocal legal assistance which Peru has signed with the requesting State; in the absence thereof, they shall apply the principle of reciprocity.

Only when the court order has been issued can property be impounded or funds and other financial assets be frozen.

1.5 The effective suppression of the financing of terrorism requires the adoption of measures to ensure that religious, educational, cultural and other non-governmental associations are registered and their accounts are audited so as to prevent the diversion of their funds and assets for other than intended purposes, in particular to terrorist activities. It is stated in the supplementary report that this requirement is not covered by the proposed law (page 7). The CTC would be grateful to know the intentions of Peru in this regard.

Peru maintains a Register of Legal Persons, in which associations, foundations, cooperatives, rural and indigenous communities and records relating thereto are recorded.

However, it is not a function of this Register to monitor the movement of the funds and assets of such organizations. In Peru, the relevant monitoring mechanism is the transmission of information on suspicious transactions to the competent national body by certain entities which receive funds.

The Financial Intelligence Unit (FIU) is the body responsible for the evaluation, processing and transmission of information in order to prevent and identify asset laundering.

Transactions subject to monitoring are those carried out by regular or occasional customers of the reporting entities, listed in Annex III, in amounts of US$ 10,000 (ten thousand United States dollars) or more, or the equivalent in national currency, except in the case of funds transfer firms, casinos, lottery firms and gambling houses, including bingo parlours, horse-racing tracks and agencies of the foregoing, which must report transactions of US$ 2,500.00 (two thousand five hundred United States dollars) or more or the equivalent in national currency.

Reporting entities must inform the FIU of any suspicious transactions they uncover in the course of their operations, regardless of the amounts involved, within thirty (30) calendar days of the date on which the transactions are identified. The FIU shall transmit information on suspicious transactions to the Public Prosecutor's Office, which shall determine whether there is sufficient evidence and take the necessary legal action.

Any unusual transaction which leads the reporting entity to believe, on the basis of its information on the customer, that the funds involved in the transaction are derived from an illegal activity on the grounds that they have no apparent economic or legal justification shall be deemed to be suspicious for such purposes.

1.6 Please provide an outline of the provisions of the new law that enable authorities in Peru to prevent and criminalize recruitment to terrorist groups either inside or outside the territory of Peru.

Thus far, recruitment to terrorist groups either inside or outside the territory of Peru is not covered by domestic law. However, Legislative Decree No. 25475, article 4 (d), defines the organization of courses or the managing of centres for the indoctrination and instruction of terrorist groups, operating under any cover, as an act of collaboration.

1.7 The effective implementation of subparagraph 2 (d) requires every State to prevent the use of its territory by those who plan, facilitate or commit terrorist acts against other States or their citizens. Article 338 of the Penal Code is reported to be applicable to any act intended to change the political organization of any foreign State through violence as an "offence jeopardizing the foreign relations of the State". This does not seem to cover the requirements of subparagraph 2 (d). How does Peru propose to meet this requirement?

All acts committed in Peruvian territory by nationals or foreigners which constitute offences per se are punishable under Peruvian law.

1.8 It is stated in reply to subparagraph 3 (d) at page 17 of the supplementary report that, to date, no domestic law incorporating the provisions of the treaties to which Peru is a party has been implemented because there has been no occurrence of the kind covered by the Conventions and that the crimes would be covered by existing legislation. Could Peru please explain how it has currently criminalized in its domestic laws the various acts of terrorism referred to in the international instruments related to the prevention and suppression of international terrorism and what penalties have been imposed for such acts in its criminal laws?

No provision of Peruvian law authorizes the prevention and suppression of international terrorism, but Peru has adequate legislative provisions defining terrorism as an offence and containing precise descriptions of the constituent elements thereof and of the applicable penalties. The wording of these provisions leaves open the possibility that various criminal activities related to terrorism may be deemed to fall within the scope of existing definitions of offences. However, this does not mean that the Peruvian Government does not support the promulgation of specific legislation consistent with international instruments, which would make it easier for the courts to identify and punish the offence of terrorism.

Lima, 28 June 2004